

4 Official Opinions of the Compliance Board 28 (2004)

EXECUTIVE FUNCTION – DISCUSSION BY COMMUNITY COLLEGE BOARD OF TRUSTEES OF VARIOUS ADMINISTRATIVE AND BUDGETARY MATTERS, HELD TO FALL WITHIN THE EXCLUSION – DISCUSSION OF PRELIMINARY ASPECTS OF POLICY AND CONTRACTUAL MATTERS, HELD TO FALL OUTSIDE THE EXCLUSION – NOTICE REQUIREMENTS – METHOD – ANNOUNCEMENT OF FUTURE MEETING AT OPEN MEETING ATTENDED BY REPORTER COMPLIES WITH ACT

March 16, 2004

*The Honorable Joanne S. Parrott
Maryland House of Delegates*

The Open Meetings Compliance Board has considered your complaint concerning the Board of Trustees of Harford Community College. The complaint suggested that the Board of Trustees may have violated the Open Meetings Act in connection with certain sessions by failing to provide notice of the sessions and failing to keep minutes as required by the Act. For the reasons set forth below, we conclude that no violation occurred.

I

Complaint and Response

The complaint arose when you and other members of the legislature representing Harford County, as well as other officials, were invited to visit the Harford Community College on September 9, 2003, to tour the campus, have dinner with the Board of Trustees, and attend the Board of Trustees' public meeting scheduled that evening. According to the complaint, on your arrival on the campus, you witnessed a meeting of the Board of Trustees, a session that was described to you as a "half-day retreat." Apparently, the retreat was a continuation of a session that had started on an earlier date. The complaint noted that there was no moderator present and the session appeared to have continued behind closed doors throughout the course of the tour. Based on the assumption that the Open Meetings Act applies to a retreat of a public body, the complaint asked that the Compliance Board determine whether the Board of Trustees provided notice as required under the Act.

The complaint also questioned whether the dinner hosted by the Board of Trustees and attended by the officials who visited the College, held in a private dining room in the College's Chesapeake Center, violated the Open Meetings Act. The complaint noted that neither representatives of the press nor of the general

public were in attendance. The complaint speculated that public notice of the “dinner meeting” was not provided.

Based on information provided by unidentified individuals, the complaint also indicated that the Board of Trustees met at the College on October 23 and December 23, 2003, and speculated that public notice of these meetings was never provided. Finally, the complaint noted that “other possibilities may exist where the Board of Trustees convened other private meetings without advance notice to the public” focusing, in particular, on the period September 10 through December 24, 2003, and questioned whether “proper documentation of any of the closed meetings was duly prepared and recorded in the minutes of the next scheduled open meeting.”

In a timely response on behalf of the Board of Trustees, Leslie Robert Stellman, Counsel to the Board, denied the Open Meetings Act was violated. The Board of Trustees provided additional factual information in connection with the retreat. According to the response, the session that the Delegate witnessed was the second session of a long-planned retreat; the first session was held August 12, 2003. The retreat, characterized as “education/training sessions,” had been proposed by the College President and agreed to by the Board of Trustees during a public meeting of the Board on June 10, 2003. Minutes of the June 10 meeting were included with the response. Contrary to the suggestion in the complaint, the Board of Trustees denied that the retreat was closed to the public. While the door of the room was closed September 9 in order to take better advantage of the building’s air conditioning, the response stated that a sign indicating “Board of Trustees meeting” had been prominently posted in the hallway, directing the public to the entrance of the board room. Acknowledging that notice of the retreat had not been previously announced in the media, the Board noted that the September 9 session had been previously announced during the August 12 session and both sessions were reflected in the minutes of the June 10 meeting. The Board of Trustees acknowledged that the retreat did not include a moderator. Included with the Board’s response were copies of the Board’s minutes from the August 12 and September 9 sessions.

Although the retreat sessions were open to the public, the position of the Board of Trustees was that the Open Meetings Act did not apply. Rather, in the Board’s view, the retreat involved an executive function, outside the scope of the Act. §10-503(a)(1)(i).¹ The Board of Trustees characterized the session held September 9 as a retreat at which Board members were given updates by the College President on numerous matters pending in connection with the College and a

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland. A public body is ordinarily free to open a meeting even if not required to do so by the Open Meetings Act. Hence, the fact that a meeting is open does not necessarily imply that the Act applied to the meeting.

briefing by a labor lawyer concerning the proper handling of personnel records. The response outlined the topics covered and noted that the topics addressed “were not intended to create new policies, nor did the Board engage in public business. No action was taken, no policy was debated, and no vote was tabulated...”

The Board of Trustees addressed the role of the College President in relation to the Board and drew an analogy to the relation between a local school system superintendent and county board of education, relying, in part, on Compliance Board Opinion 00-10 (October 18, 2000), in which we explored at considerable length the application of the executive function exclusion in the context of a local board of education.

The Board of Trustees argued, in the alternative, that even if the session had been subject to the Act, the session was not closed to the public and the notice requirements of the Act were satisfied.

As for the dinner hosted by the Board of Trustees, the response noted that the event “was a social gathering, no public business was conducted, no vote or action was taken ...”. Relying on prior opinions of the Compliance Board, the Board of Trustees argued that the dinner was not subject to the Act. Finally, the Board of Trustees denied that the Board met, in either an open or closed session, on either October 23 or December 23.

II

September 9 Retreat

A. The Irrelevance of Labels

The label attached to a particular session conducted by a public body, such as “retreat,” does not determine whether the Open Meetings Act applies. Office of the Maryland Attorney General, *Open Meetings Act Manual* p. 9 (4th ed. 2000) (obligations under Act not avoided by labeling meeting “work session or pre-meeting”). Whether a “retreat” is subject to the Act must be analyzed in the same manner as any other session: Did a quorum of a public body convene to consider any phase of a topic of public business subject to the Act? Compliance Board Opinion 01-10 (June 21, 2001), slip op. at 3.

There is no question that the Board of Trustees is a “public body” as defined under the Act and that they “met” with the President of the College on September 9. §10-502(g) and (h).² The issue is whether or not the Board of Trustees engaged in public business that is subject to the Act. In its response, the Board of Trustees has argued that the September 9 session involved an “executive function.” Thus, under the Board of Trustees’ view, neither the substantive nor the procedural requirements of the Open Meetings Act applied to the session, regardless of whether it was open or closed. §10-503(a)(1)(i).

B. *Executive function*

1. *In General*

In its response, the Board of Trustees accurately quoted the applicable test of whether a particular matter constitutes an “executive function,” as articulated in a prior opinion of the Compliance Board:

The term “executive function” is defined in part by what it is not: a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is by definition not an executive function. If a discussion is not encompassed by any of these other functions, however, *and* involves “the administration of” existing law, it falls within the executive function exclusion. §10-502(d) ... The second aspect of the analysis requires consideration whether the matter involves the development of new policy, or merely the application of an already established law or policy. The executive function exclusion covers only the latter. ...

Compliance Board Opinion 00-10 (October 18, 2000), slip op. at 2-3 (internal citation omitted). The response described the parallels in the relationship between a school superintendent and local board of education and the College President and the Board of Trustees, emphasizing the duties of the College President and her obligation to report directly to the Board of Trustees. *See, e.g.*, Education Article, §§16-102(a)(2) (role of president as secretary/treasurer of the board) and 16-104(b) (duties of college president). Relying on Compliance Board Opinion 00-10, the

² “Public body” is defined, in part, for purposes of the Act as an “entity that ... consists of at least 2 individuals ... [that] is created by ... a State statute ...”. §10-502(h)(1)(i) and (ii)2. The Board of Trustees is established by §16-101(a) of the Education Article, Annotated Code of Maryland. “Meet” is defined for purposes of the Act as “to convene a quorum of a public body for the consideration or transaction of public business.” §10-502(g).

Board of Trustees concluded that “where the College President or her staff share information with the Board of Trustees involving administrative matters under the authority of the President, where they do not involve policy matters that would be addressed by the Board,” the Board of Trustees is engaged in an executive function and the Open Meetings Act does not apply.

2. *Administrative matters*

Based on a review of the minutes, we agree that the majority of items considered during the course of the September 9 session appear to have come under the executive function exclusion and thus were outside the scope of the Act. These matters did not encompass other defined functions or involve the Board of Trustees in a policy-making role. Some of these were administrative matters that were shared with the Board of Trustees for informational purposes. Examples included information on visits by individuals from other countries, the status of an existing international program, the College Assembly’s involvement in international education,³ an overview of the current College organization, the tour provided to legislators during the course of the Board of Trustees’ session, and a briefing by a labor lawyer on the proper management of personnel files.

3. *Appointment of vice president*

Other items appear to involve matters that would directly involve the Board of Trustees, but would still be considered executive functions. One item involved the status of a vacant position, the vice president for instruction and learning resources. While the College President is charged with recommending candidates for appointments, the actual appointment to positions at the College is vested in the Board of Trustees.⁴ Education Article §§ 16-103(d) and 16-104(b)(2). It appears that discussion on September 9 was limited to the status of the search and identification of individuals handling interim responsibilities. In our view, these matters were properly considered executive functions. The discussions did not appear to have involved consideration of any contractual matter.

³ The College Assembly is a 12-member group made up of students, staff, faculty, and administrators that focuses on facilitating collaborative leadership and ensuring parity on behalf of students and employees. One of its functions is to advise the President on college affairs. See College Assembly’s website, <http://www.harford.edu/Assembly/default.asp>.

⁴ Thus, the matter did not involve any aspect of the Board of Trustees’ approval or disapproval of someone else’s appointment, which is a legislative function. §10-502(f)(2). See, e.g., Compliance Board Opinion 95-5 (October 18, 1995), reprinted in 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 123, 125 (school board’s appointment of acting superintendent constituted executive function).

4. *Budgetary matters*

The Board of Trustees also considered current pay plans and sample contracts as well as potential salary adjustments – a matter scheduled for further discussion at a future session. To be sure, the Board of Trustees is authorized to set salaries for college officials and employees. Education Article, §16-103(d). However, the Board does not have independent budget authority. Although the Board of Trustees and the President prepare a proposed budget for the College, final action on the budget lies with the county governing body, subject to minimum funding requirements tied to increases in State aid. Education Article §§16-301(e) and 16-305(d).⁵

In a prior opinion, we considered the role of a local board of education in preparation of a budget for presentation to the county governing body. Compliance Board Opinion 00-10 (October 18, 2000), slip op. at 6-7. Relying on the distinction between preparation of a proposed budget and consideration of the budget as a legislative process recognized in *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 446 A.2d 63 (1982), we concluded that a local board of education's role in the budgetary process falls on the preparation side of the divide, and thus constituted an executive function under the Act. Compliance Board Opinion 00-10, slip op. at 7. We believe the same conclusion holds true here. Whether the issue is viewed as the Board of Trustees carrying out an administrative responsibility under Education Article, §16-103(d), or as carrying out its responsibility in developing a proposed budget under § 16-301, we conclude that the item labeled by the Board of Trustees as a “[c]ontinuing budget discussion” involved an executive function.

5. *Other matters*

A few matters addressed during the course of the September 9 session do not appear to fit with the in executive function exclusion. The College President presented proposed guidelines for issuance of honorary decree. Furthermore, the Board of Trustees considered updating the College's “strategic directions.” Although the information available to us is limited, it would appear that both of these items would involve the early stages of policy matters that, at some point, would come back before the Board of Trustees for final action. Other matters involved management of the Community College's property, *i.e.*, an easement request by a developer and the right to locate a generator on campus. Both of these matters involve contractual matters that apparently would come before the Board for approval. Because the Board of Trustees' action on a contract would be a “quasi-

⁵ Even following adoption of a budget, any effort by the Board of Trustees to transfer appropriations among major functions in the budget would be subject to the county governing body's control. *See* Education Article, § 16-304(c).

legislative function” under the Act, §10-502(j)(3), by definition, these items could not be considered executive functions. §10-502(d)(2)(v); Compliance Board Opinion 02-10 (July 10, 2002), slip op. at 5.

To the extent that discussions involved matters outside of the executive session exclusion, the provisions of the Open Meetings Act applied. Thus, we turn to the Board of Trustees’ alternative argument – that the meeting was conducted in accordance with the Act.

C. Procedural Requirements of Act

We accept the Board of Trustees’ explanation that the September 9 session was open to the public, had a member of the public elected to attend. A closed door is not necessarily synonymous with a closed meeting, and the explanation about air conditioning is reasonable. Furthermore, minutes of the session were obviously produced. Thus, the only question is whether the Board of Trustees provided adequate notice of the session. Without proper notice, an “open” meeting is fictive.

The Act requires a public body to give “reasonable advance notice” of a meeting that is subject to the Act. §10-506(a). “Whenever reasonable, [the] notice ... shall: (1) be in writing; [and] (2) include the date, time, and place of the session...” §10-506(b)(1) and (2). In general, a public body ought to use a method reasonably calculated to inform broadly those interested in forthcoming meetings. Compliance Board Opinion 01-4 (February 22, 2001), slip op. at 4. The Act, however, specifies several means of notice, any one of which is legally sufficient:

A public body may give the notice under this section as follows:

- (1) if the public body is a unit of the State government, by publication in the Maryland Register;
- (2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;

(3) if the public body previously has given public notice that this method will be used, by posting or depositing the notice at a convenient public location at or near the place of the session; or

(4) by any other reasonable method.

§10-506(c). The second of these, “delivery to representatives of the news media,” presumably reflects the assumption that this form of notice at least enables press presence at the future meeting and, if disseminated in the news media, indirectly informs the public as well.

The Board of Trustees acknowledged that notice of the session was not published in the media. However, the Board noted that the session was announced at the August 12 session and recorded in the minutes of the Board’s June 10 meeting.⁶

It does not appear that a representative of the news media who would normally cover the Board of Trustees’ sessions was present at the August 12 session. If not, the Act’s notice requirements were not satisfied by way of the announcement. Furthermore, we reject the suggestion that announcement of a future meeting through publication of minutes of a prior meeting satisfied the Act’s notice requirements. It is hardly reasonable to expect the public to monitor the minutes of a public body in order to determine the time and place of future meetings.

However, we do note that the minutes of the June 10 meeting reflected that a representative of *The Aegis*, a local newspaper, was in attendance. The reporter’s presence at the session resulted in substantial compliance with a method of providing notice under provisions of the Act. §10-506(c)(2); *see* Compliance Board Opinion 02-4 (May 21, 2002), slip op. at 3; *see also* Compliance Board Opinion 93-5 (April 23, 1993), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 33, 34.

In summary, we conclude that the September 9 “retreat” did not violate the Act.

⁶ We do not interpret the Board of Trustees’ response as suggesting the signage posted satisfied the Open Meetings Act notice requirement. It appears that the signage was intended simply to provide directional information.

III

Other Allegations

A. Dinner Session

The complaint suggested that the dinner hosted by the Board of Trustees and attended by the officials who had visited the College September 9 may have violated the Act.

The presence of a quorum of a public body alone does not invoke the Open Meetings Act. In order for a meeting to occur, the public body must assemble for the “consideration or transaction of public business.” §10-502(g) (definition of the term “meet”). The Act does not apply to a social gathering, as long as the members of the public body refrain from discussion of public business or other action intended to circumvent the Act. §10-503(a)(2). Compliance Board Opinion 03-2 (January 22, 2003), slip op. at 2.

The Board of Trustees described the dinner as a “social event” at which no public business was conducted. The complaint suggested no evidence to the contrary. Thus, on the basis of the information available to us, we conclude that the dinner session was not subject to the Open Meetings Act and the notice requirements of the Act did not apply.

B. Alleged October 23 and December 23 Sessions

The complaint also alleged that the Board of Trustees met on campus on October 23 and December 23. The Board of Trustees responded that the Board did not meet on either of these dates. Based on the record before us, we have no reason to believe that violations occurred.⁷

IV

Conclusion

Most of the items addressed during the “retreat” of the Board of Trustees on September 9, 2003, fell under the executive function exclusion of the Act. Therefore, neither the Act’s substantive nor procedural requirements applied. However, several items addressed that afternoon do not appear to qualify as

⁷ The complaint also suggested that the Board of Trustees may have met in private on other occasions between September 10 and December 24. The Board of Trustees did not address this allegation. Considering the limited factual foundation in the complaint and the lack of additional information in the response, we decline to address this allegation.

executive functions. Nonetheless, the session was open to the public and the procedural requirements of the Act were satisfied. The dinner session was not a meeting under the Open Meetings Act since no consideration of public business occurred. Finally, we accept the Board of Trustees' explanation that the board did not meet on October 23 or December 23. In summary, we find that no violation of the Open Meetings Act occurred.

OPEN MEETINGS COMPLIANCE BOARD

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